

sent  
out 1/2  
7/5/08

1 KEVIN BURTON  
2 #C 38062  
3 R.J. DONOVAN STATE PRISON  
4 P.O. Box 799007  
5 SAN DIEGO, CA 92179

RECEIVED

08 SEP -5 AM 10:46

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

6 UNITED STATES DISTRICT COURT  
7 NORTHERN DISTRICT OF CALIFORNIA

9 KEVIN BURTON

10 Plaintiff

11 vs.

12 California Department of  
13 Corrections, et al.,  
14 Defendants

CASE NO: 07-4967 PJH(PR)

REQUEST TO COURT CLERK  
for LOCAL RULES OF COURT  
AND LEGAL FORMS.

15  
16  
17 COMES NOW Plaintiff, KEVIN BURTON IN Pro se, Respectfully  
18 Request the clerk of the court provide plaintiff with, Local  
19 Rules of Court for the Northern District of California, that  
20 Plaintiff may abide by, and follow such rules. Plaintiff also  
21 request the clerk of the court to provide plaintiff with the  
22 following legal forms if available. Plaintiff asserts, that the  
23 Prison library will not and have not, (on request by plaintiff)  
24 provide plaintiff with above Rules and Forms Requested, because  
25 Plaintiff is Indigent. By order of this court, it is plaintiff respons-  
26 ibility to prosecute this case pursuant to Federal Rule of Civil  
27 Procedure 41(b).  
28

Dated: August 31, 2008

Respectfully Submitted  
Kevin Burton

1 Plaintiff Request for THE following Legal forms:  
2 (IN Triplet)

- 3 1) MOTION for LEAVE to file AN AMENDED COMPLAINT.
- 4 2) Declaration for Entry of Default.
- 5 3) MOTION for Judgment by Default.
- 6 4) DECLARATIONS Forms.
- 7 5) MOTION for Reconsideration from THE COURT.
- 8 6) MOTION asking THE COURT TO order THE defendants to reply.
- 9 7) MOTION for Extension of TIME.
- 10 8) MEMORANDUM IN OPPOSITION TO defendants MOTION.
- 11 9) MOTION for CONTINUANCE.
- 12 10) MOTION to alter or AMEND THE Judgment.
- 13 11) NOTICE of appeal TO U.S. COURT OF APPEALS (9th circuit)
- 14 12) IN FORMA PAUPERIS form, for U.S. COURT OF APPEALS (9th cir.)
- 15 13) MOTION for order Compelling Discovery.
- 16 14) MOTION TO DISMISS.

17 Dated: August 31, 2008

18 By: Kevin Burton

19 KEVIN BURTON

20 # C-38062

21 R.J.D. PRISON

22 SAN Diego, CA 92179

JUN 06 2008

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

7/1/08

KEVIN BURTON,

Plaintiff,

No. C 07-4967 PJH (PR)

vs.

**ORDER OF SERVICE**

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION;  
DIRECTOR, CDCR; MIKE EVANS,  
Warden; Lieutenant KRENKE; Sergeants  
RAMIREZ, BRUNCATO, and O'KENNO;  
Correctional Officers CORRASCO,  
SILVA, CONTRERAS, PHILMON,  
WILSON, HORRENCE, PEREZ,  
GARCIA, GRAYWALD, and  
GOODHUME; MTAs CAUNTAY,  
GARCIA, ZIEGLER, AND MOSS; and  
DOES 1-50,

Defendants.

Plaintiff, a prisoner at the San Diego Central Jail, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. He has been granted leave to proceed in forma pauperis.

Venue is proper in this district because the complaint involves events at Salinas Valley State prison, which is in this district. See 28 U.S.C. § 1391(b).

**DISCUSSION**

**A. Standard of Review**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief

1 may be granted, or seek monetary relief from a defendant who is immune from such relief.  
2 *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica*  
3 *Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

4 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of  
5 the claim showing that the pleader is entitled to relief." "Specific facts are not necessary;  
6 the statement need only "give the defendant fair notice of what the . . . claim is and the  
7 grounds upon which it rests."" *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (citations  
8 omitted). Although in order to state a claim a complaint "does not need detailed factual  
9 allegations, . . . a plaintiff's obligation to provide the 'grounds of his 'entitle[ment] to relief'  
10 requires more than labels and conclusions, and a formulaic recitation of the elements of a  
11 cause of action will not do. . . . Factual allegations must be enough to raise a right to relief  
12 above the speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65  
13 (2007) (citations omitted). A complaint must proffer "enough facts to state a claim for relief  
14 that is plausible on its face." *Id.* at 1956-57.

15 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
16 elements: (1) that a right secured by the Constitution or laws of the United States was  
17 violated, and (2) that the alleged deprivation was committed by a person acting under the  
18 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

## 19 **B. Legal Claims**

20 Because plaintiff refused to be housed with a cellmate, he was placed in a "holding  
21 cage." He says that the cage is four feet long by two feet wide and is eight feet high. It is  
22 constructed out of metal honeycomb, so the occupant is always visible. The cage has  
23 neither overhead light nor sanitary facilities. Because of the size of the cage, plaintiff  
24 alleges it was not possible to sit or lie down. He was allowed only boxer shorts and socks  
25 for clothing, but a guard who is not a defendant gave him a sheet to wrap about himself on  
26 the first night. When he was put into the cage there was milk carton with urine in it in the  
27 cage and the sides were caked with feces. A guard removed the carton but nothing was  
28 done about the feces. He was allowed out briefly twice a day to go to the bathroom, but



1 was not allowed to clean himself or exercise.

2 Plaintiff was kept in the cage for eight days and seven nights. He filled out sick-call  
3 slips at least twice because his legs were swelling and he was having back trouble. No  
4 medical care was provided. He suffered cramps in his legs and back. By the end of his  
5 confinement he was unable to sleep because of the pain and was hallucinating.

6 Plaintiff has pleaded nine causes of action; the first two are federal Eighth  
7 Amendment claims, the others are state-law claims. The first through seventh causes of  
8 action are against "all defendants." The eighth claim, headed "Negligent Training or  
9 Supervision," is against the CDCR, the director of the CDCR, and Warden Evans. The  
10 ninth claim, headed "respondeat superior," is against the CDCR.

11 Plaintiff alleges that all of the defendants except the CDCR, the director of the  
12 CDCR, and Warden Evans were directly aware of his situation. The federal and state law  
13 claims against defendants other than the CDCR, the director, and Evans contain  
14 allegations sufficient to require a response from them.

15 The Eleventh Amendment prevents the CDCR, which is a state agency, from being  
16 sued in federal court. *See Simmons v. Sacramento County Superior Court*, 318 F.3d  
17 1156, 1161 (9th Cir. 2003) (11th Amendment bars suit against state superior court and its  
18 employees); *Bennett v. California*, 406 F.2d 36, 39 (9th Cir. 1969) (California Adult  
19 Authority and California Department of Corrections not persons within meaning of Civil  
20 Rights Act); *see also Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 541-  
21 42 (2002) (Eleventh Amendment bar includes state law claims brought against a state in  
22 federal court under the supplemental jurisdiction statute, 28 U.S.C. § 1367). All claims  
23 against the CDCR – state and federal – will be dismissed.

24 The claims which include as a defendant the "Director, CDCR," claims one through  
25 eight, are essentially John Doe claims. Because plaintiff requests only damages,  
26 substitution of the current director would not be appropriate. No further action will be taken  
27 on the claims against the director or the John Doe claims, but plaintiff should amend to add  
28 these defendants' true names if he learns them.

Plaintiff has not provided any factual allegations which would support the warden's liability on the first through seventh claims. As to the eighth claim, negligent training or supervision, plaintiff contends that Evans knew there was a lack of training or supervision that led to his confinement in the cage for a week. This is sufficient to require a response from Evans.

### CONCLUSION

1. For the foregoing reasons, all claims against defendant CDCR are **DISMISSED** with prejudice. Claims one through seven against Warden Evans are **DISMISSED** without prejudice.

2. The clerk shall issue summons and the United States Marshal shall serve, without prepayment of fees, copies of the complaint with attachments and copies of this order on the following defendants: Mike Evans, Warden; Lieutenant Krenke; Sergeants Ramirez, Bruncato, and O'Kenno; Correctional Officers Corrasco, Silva, Contreras, Philmon, Wilson, Horrence, Perez, Garcia, Graywald, and Goodhume; and MTAs Cauntay, Garcia, Ziegler, and Moss.

3. In order to expedite the resolution of this case, the court orders as follows:

a. No later than sixty days from the date of service, defendants shall file a motion for summary judgment or other dispositive motion. The motion shall be supported by adequate factual documentation and shall conform in all respects to Federal Rule of Civil Procedure 56, and shall include as exhibits all records and incident reports stemming from the events at issue. If defendants are of the opinion that this case cannot be resolved by summary judgment, they shall so inform the court prior to the date their summary judgment motion is due. All papers filed with the court shall be promptly served on the plaintiff.

b. Plaintiff's opposition to the dispositive motion, if any, shall be filed with the court and served upon defendants no later than thirty days from the date the motion was served upon him. Plaintiff must read the attached page headed "NOTICE -- WARNING," which is provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir.

1998) (en banc), and *Klingele v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

If defendants file an unenumerated motion to dismiss claiming that plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), plaintiff should take note of the attached page headed "NOTICE -- WARNING (EXHAUSTION)," which is provided to him as required by *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th Cir. 2003).

c. If defendants wish to file a reply brief, they shall do so no later than fifteen days after the opposition is served upon them.

d. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the court so orders at a later date.

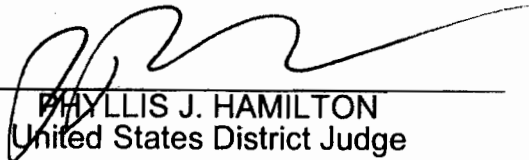
4. All communications by plaintiff with the court must be served on defendants, or defendants' counsel once counsel has been designated, by mailing a true copy of the document to defendants or defendants' counsel.

5. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) is required before the parties may conduct discovery.

6. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court informed of any change of address by filing a separate paper with the clerk headed "Notice of Change of Address." He also must comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

**IT IS SO ORDERED.**

Dated: June 6, 2008.

  
PHYLLIS J. HAMILTON  
United States District Judge

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UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

KEVIN BURTON,

Plaintiff,

v.

CALIFORNIA DEPT OF CORRECTIONS et  
al,

Defendant.

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Case Number: CV07-04967 PJH

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on June 6, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Kevin Burton C-38062  
R.J. Donovan State Prison  
P.O. Box 779007  
San Diego, CA 92179

Dated: June 6, 2008



Richard W. Wieking, Clerk  
By: Nichole Heuerman, Deputy Clerk



## VERIFICATION

STATE OF CALIFORNIA  
COUNTY OF SAN DIEGO

(C.C.P. SEC. 446 & 2015.5; 28 U.S.C. SEC. 1746)

I, KEVIN BURTON DECLARE UNDER THE PENALTY OF PERJURY  
THAT: I AM THE Declarant/Prisoner IN THE ABOVE ENTITLED ACTION;  
I HAVE READ THE FOREGOING DOCUMENTS AND KNOW THE CONTENTS THEREOF AND THE SAME IS  
TRUE OF MY OWN KNOWLEDGE, EXCEPT AS TO MATTERS STATED THEREIN UPON INFORMATION, AND  
BELIEF, AND AS TO THOSE MATTERS, I BELIEVE THEM TO BE TRUE.

EXECUTED THIS 1st DAY OF September, 2008 AT R.J.D.  
STATE PRISON, 480 Alta Road, San Diego, CA 92179

(SIGNATURE) Kevin Burton  
(DECLARANT/PRISONER)

## PROOF OF SERVICE BY MAIL

(C.C.P. SEC. 1013 (a) & 2015.5; 28 U.S.C. SEC. 1746)

I, Lennie THOMAS, AM A RESIDENT OF R.J.D. STATE PRISON, IN THE COUNTY  
OF S.D. STATE OF CALIFORNIA; I AM OVER THE AGE OF EIGHTEEN (18) YEARS OF AGE AND AM AM  
NOT A PARTY OF THE ABOVE-ENTITLED ACTION. MY STATE PRISON ADDRESS IS: P.O. BOX 799007  
SAN DIEGO, CA

ON Sept 1, 2008, I SERVED THE FOREGOING:

Request For Federal Rules of Civil Procedures, AND COURT FORMS

(SET FORTH EXACT TITLE OF DOCUMENTS SERVED)

ON THE PARTY(S) HEREIN BY PLACING A TRUE COPY(S) THEREOF, ENCLOSED IN A SEALED ENVELOPE  
(S), WITH POSTAGE THEREON FULLY PAID, IN THE UNITED STATES MAIL, IN A DEPOSIT BOX SO  
PROVIDED AT Richard J. Donovan Correctional Facility

Addressed as follows:

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OFFICE OF THE CLERK  
450 Golden Gate Ave.  
SAN FRANCISCO, CA 94102

THERE IS DELIVERY SERVICE BY UNITED STATES MAIL AT THE PLACE SO ADDRESSED, AND THERE IS  
REGULAR COMMUNICATION BY MAIL BETWEEN THE PLACE OF MAILING AND THE PLACE SO  
ADDRESSED. I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATE: September 1 2008 Kevin Burton  
(DECLARANT/PRISONER)

KEVIN BURTON  
C-38062

J. DONOVAN STATE PRISON  
P.O. Box 799007 8-124  
SAN DIEGO, CA 92179

Confidential  
Legal Mail

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STATE PRISON



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Northridge  
Office  
Police  
Department

8-1-08  
J. J. J.

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8-12-08